SUPREME COURT, U. S
FILE
APR 2
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

No. 73–1277

EUGENE CHARLES RANDONO,
Petitioner,

v.

SHERIFF, CLARK COUNTY, NEVADA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT LIST
Attorney General
ROBERT GROVES
Deputy Attorney General
Supreme Court Building
Carson City, Nevada 89701
Attorney for Respondent

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OPINION BELOW

The opinion of the Nevada Supreme Court is unreported, and is printed in Appendix A of the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Whether the arrest and attempted extradition of petitioner as a fugitive from justice from the State of California was proper under the laws of Nevada and the Constitution of the United States? Whether in a state court, in an extradition proceeding, a writ of habeas corpus may be used to test the constitutional validity of anticipated penal action in the demanding state?

STATUTE INVOLVED

Uniform Criminal Extradition Act, Nevada Revised Statutes 179.177 to 179.235, inclusive. A copy of the Nevada Uniform Criminal Extradition Act is printed in Appendix A hereto.

STATEMENT OF THE CASE

On April 16, 1973, petitioner was convicted in the Superior Court of Orange County, California, of two felony counts, to wit: (1) conspiracy to falsely and maliciously have another indicted for any crime or to procure another to be charged or arrested for any crime and (2) offering a bribe to a police officer. Sentencing in the petitioner's case was set for May 17, 1973, and in the meantime the petitioner was permitted to remain free on bail and return to his home in Las Vegas, Nevada.

On May 17, 1973, the day set for sentencing, petitioner's California counsel appeared before the Orange County Superior Court at the appointed time and requested a continuance of the hearing, advising the court that petitioner was at that time hospitalized in Southern Nevada Memorial Hospital in Las Vegas. To substantiate this fact, California counsel submitted a letter (not under oath) from Dr. George Kleifgen. The motion for a continuance was denied by Superior Court Judge William

Speirs, who thereupon issued a bench warrant for petitioner's arrest. Pursuant to the warrant, a formal demand was made by the Governor of California upon the Governor of Nevada for the arrest and extradition of petitioner and the petitioner was placed under the custody of the Nevada authorities at Southern Nevada Memorial Hospital in Las Vegas.

Subsequently, petitioner was released from custody on bail, and he thereafter filed a petition for writ of habeas corpus in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. The matter ultimately came on for hearing before the court September 12, 1973. At that time, petitioner presented two witnesses on his behalf. The first was his California counsel who testified as to events in court at the time he requested a continuance for the sentencing hearing on May 17, 1973. In addition, the California counsel expressed certain opinions on the possible prejudices of the sentencing judge toward petitioner and Nevadans in general and ventured a guess as to the court's probable decision if the petitioner were returned for sentencing.

The second witness on behalf of the petitioner was a heart specialist who testified about petitioner's then present condition and prognosis. The Nevada District Judge, at the conclusion of the hearing, granted a writ of habeas corpus and discharged petitioner. The Attorney General of Nevada immediately filed a notice of appeal to the Supreme Court of Nevada and the designation of record. On its own motion, the Supreme Court took the case under advisement without requiring briefs or oral arguments. Petitioner never formally moved the court for briefing by the parties.

After due consideration, the Nevada Supreme Court issued its opinion on November 20, 1973, wherein it reversed the District Court Order granting a writ of habeas corpus.

ARGUMENT

I

PETITIONER HAS NOT RAISED A GENUINE FEDERAL QUESTION

In the petition, it is contended that the statute involved in this case is the federal extradition statute, 18 U.S.C. Section 3182. A perusal of both the petition for writ of habeas corpus that was filed in the Nevada District Court, the opinion of the Nevada Supreme Court, and the record as a whole, fails to disclose even a single instance where the federal statute is referred to or relied upon by either of the parties or the courts involved.

Granted that the state law on extradition cannot validly be in conflict with federal law, and granted that the decisions of the United States Supreme Court on extradition matters are binding on the states, it is nevertheless correct that the federal act is not exclusive, *New York v. O'Neill*, 359 U.S. 1, 5, 10 (1959), and the states have been permitted to enact uniform legislation in this regard, mainly the Uniform Criminal Extradition Act, which is the basis for the Nevada statute involved in this case, NRS 179.177 et.seq.

Petitioner has attempted, by referring to a non-exclusive federal statute, to transform what is essentially a state matter, under state law, into a federal question. It is elementary, however, that a federal question does not arise merely because a federal statute may be peripherally involved.

II

PETITIONER DID NOT PROPERLY RAISE ANY FEDERAL STATUTORY OR CONSTITUTIONAL QUESTION IN THE STATE COURTS

Even if this were a federal question, it was not properly raised on the state level. Neither the petition for a writ of habeas corpus, the transcript of the September 12, 1973, habeas corpus hearing,

nor the opinion of the Nevada District Court or that the Nevada Supreme Court discloses any reference to the federal statute.

In addition, even a valid federal question may not be raised for the first time in a petition to the United States Supreme Court; it must be properly raised and considered in the court below. *White River Lumber Company v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1928); *Whitney v. California*, 274 U.S. 337, 362–63 (1926). It is submitted that there is no showing whatsoever that the issue of conformity with the federal statute was ever properly raised below. Rules of the Supreme Court, Rule 23.1 (f).

Of course, even if a valid federal question is properly raised below, it cannot be urged as a ground for a petition for writ of certiorari. Unless the federal question was squarely faced and decided by the state court, the decision of the lower court cannot be reviewed. In the instant case, the opinion of the Nevada Supreme Court discloses no reference to the federal statute or to those constitutional provisions cited by petitioner. The sole references are to Nevada statutes.

As the Court said in *Beck v. Washington*, 369 U.S. 541, 549–50 (1960), the federal question must be presented to the state court and a state court opinion which merely discusses the interpretation to be given to a state statute is insufficient grounds upon which to base a U.S. Supreme Court review. As common sense would indicate, the United States Supreme Court cannot review a state court's decision on a federal question, unless the state court actually made a decision on that federal question.

And in particular, the record in this case, which is now on file with the Clerk of this Court, is totally devoid of any reference to alleged violations of petitioner's constitutional rights under either the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment. Rules of the Supreme Court, Rule 23.1 (f).

The entire thrust of the testimony offered by petitioner and the argument of his counsel in the Nevada District Court at the hearing on September 12, 1973 was (1) that the judge in Orange County, California, was prejudiced against all Nevadans and that such prejudice would affect petitioner at any future hearing or sentencing and (2) that petitioner's health continued to be unstable, with possible adverse consequences if he were returned to California and actually sent to prison, a matter which was pure speculation on the part of petitioner, his witnesses, his counsel and the Nevada District Court judge. See Appendix B hereto.

In fact, the only portion of the Constitution of the United States cited in petitioner's original petition for writ of habeas corpus appears in paragraph V thereof:

> "That in consequence of the aforesaid, the petitioner is restrained of his liberty in violation of the *Fifth Amendment* of the Constitution of the United States and Section Eight of the Constitution of the State of Nevada." (Emphasis added)

Since the Federal constitutional issues involving the Fourth Amendment and the Fourteenth Amendment are being raised here in this Court for the first time, the Court should continue its long tradition and decline to decide these matters in this particular forum. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438–39 (1969), *Crowell v. Randell*, 10 Pet. 368, 9 L.Ed 458 (1836).

III

THE DECISION OF THE NEVADA SUPREME COURT RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND

Even when a valid federal question is involved and properly raised, and perhaps even discussed by the state court, U.S.

Supreme Court review will not lie when the state court decision was based as well on an adequate and independent state ground. *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1944); *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935). In the instant case, lacking all reference to federal law, the Nevada Supreme Court decision would certainly appear to rest on adequate independent state grounds. The Supreme Court has gone even further, however, and stated that even when a federal question is involved in a state court opinion and it is not certain whether the decision was based on federal or state grounds, it will be presumed the decision was based on state grounds. *Durley v. Mayo*, 351 U.S. 277, 281 (1955); *Phyle v. Duffy*, 334 U.S. 431, 444 (1947).

IV

ASSUMING THAT A FEDERAL STATUTORY OR CONSTITUTIONAL QUESTION EXISTS AND WAS PROPERLY RAISED AND CONSIDERED BELOW, THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Respondent contends that even if a valid federal question was properly raised and considered by the state courts of Nevada, this question would not be of sufficient gravity to merit review by this Court.

Looked at broadly, petitioner is questioning whether an individual allegedly unable to appear for sentencing because of a medical condition is a fugitive from justice and may be extradited, especially in view of the fact that a medical witness indicates that incarceration in the demanding jurisdiction might be seriously detrimental to his health.

It is submitted that this is not a question of wide import, with recurring significance and importance beyond its own facts. The decision with regard to the merits of this controversy would be

expected to have little immediate effect and few implications outside the case itself.

V

THE DECISION OF THE NEVADA SUPREME COURT IS IN COMPLETE HARMONY WITH DECISIONS OF OTHER FEDERAL COURTS WHERE SIMILAR ISSUES WERE RAISED

The decision of the Nevada Supreme Court is in complete harmony with both the decisions of this Court and of other lower federal courts on extradition matters.

As extradition is a somewhat esoteric area of law, it is well first to remember the interpretation given to the extradition laws by this Court. In referring to the constitutional and statutory provisions on extradition, the Court in *Biddinger v. Commissioner of Police*, 245 U.S. 128, 133 (1917) stated:

> "* * * they have not been construed narrowly and technically by the courts as if they were penal laws * * * because, in delivering up an accused person to the authorities of a sister state, they are not sending him for trial to an alien jurisdiction whose laws or standards might condemn, but simply returning him to be tried still under the protection of the Federal Constitution. * * *"

In the instant case, petitioner's situation is even less favorable as he has already been convicted of two serious felonies after a jury trial and became a fugitive with the determination of his guilt beyond reasonable doubt already having been made.

As to whether a person who is unable to appear in the demanding state at the time of sentencing because of a claimed medical condition is a "fugitive" within the meaning of the extradition laws, the question has been well settled by previous decisions of this Court. In *Hogan v. O'Neill*, 255 U.S. 52, 56 (1920), this Court stated:

> "To be regarded as a fugitive from justice it is not necessary that one should have left the state * * * for the very purpose of avoiding prosecution, but simply that, having committed there an act which * * * constitutes a crime, he afterwards had departed from its jurisdiction, and when sought to be prosecuted, is found within the territory of another state."

Or as the Court in *Biddinger v. Commissioner of Police, supra,* at 133 indicated, it is the departure itself from the demanding jurisdiction which is the crux, "no matter for what purpose or with what motive, nor under what belief."

Also, the decisions of this Court and the lower federal courts are uniform in holding that the matters on which the Nevada District Court based its opinion in releasing petitioner from the custody of the Governor's warrant, i.e. the propriety of the California Superior Court's issuing the bench warrant for petitioner under these particular circumstances and the medical prognosis for his health while in custody in California, are not questions properly before a court in a habeas corpus proceeding on an extradition.

Courts at all levels have frequently held that only three issues may properly be raised in such a proceeding: (1) Whether the petitioner in the habeas corpus proceeding is in fact the individual sought by the demanding state, (2) whether the extradition papers are in order and he is properly charged with a crime in the demanding state or has been adjudged guilty, and (3) whether he was in the demanding state when the crime was committed. *See Biddinger v. Commissioner of Police, supra,* at 135, *United States ex rel. Vitiello v. Flood,* 374 F.2d 554, 556 (2nd Cir. 1967); *United States ex rel. Tyler v. Henderson,* 453 F.2d. 790, 793 (5th Cir. 1971).

Thus the decision of the Nevada Supreme Court that habeas

corpus may not be used to test "the constitutional validity of phases of the anticipated penal action by the demanding state" is manifestly in harmony with the decisions of the various federal courts. The Nevada Supreme Court correctly held that the Nevada District Court had considered matters not properly before it.

Throughout the proceedings below and in the petition to this Court, no authority has been cited that would authorize a trial judge to anticipate a potential violation of the constitutional rights of an accused if he is extradited to the demanding state. To the contrary are the numerous cases cited in the opinion of the Nevada Supreme Court included in the record on file herein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT LIST
Attorney General

By ROBERT GROVES
Deputy Attorney General
Supreme Court Building
Carson City, Nevada 89701

Attorney for Respondent.

APPENDIX "A"

Nevada Revised Statutes

UNIFORM CRIMINAL EXTRADITION ACT

179.177 Short title. NRS 179.177 to 179.235, inclusive, may be cited as the Uniform Criminal Extradition Act.
(Added to NRS by 1967, 1098)

179.179 Definitions. As used in NRS 179.177 to 179.235, inclusive, unless the context requires otherwise:
1. "Executive authority" means the governor, and any person performing the functions of governor in a state other than this state.
2. "Governor" means any person performing the functions of governor by authority of the law of this state.
3. "State," when referring to a state other than this state, means any other state or territory, organized or unorganized, of the United States of America.
(Added to NRS by 1967, 1098)

179.181 Fugitives from justice; duty of governor. Subject to the provisions of NRS 179.177 to 179.235, inclusive, the provisions of the Constitution of the United States controlling, and any and all Acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state.
(Added to NRS by 1967, 1098)

179.183 Form of demand. No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless it is:
1. In writing alleging, except in cases arising under NRS 179.189, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state; and
2. Accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or
3. Accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by

the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole.

The indictment, information or . ffidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

(Added to NRS by 1967, 1098)

179.185 Governor may investigate case. When a demand is made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

(Added to NRS by 1967, 1099)

179.187 Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.

1. When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

2. The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in NRS 179.223 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

(Added to NRS by 1967, 1099)

179.189 Extradition of persons not present in demanding state at time of commission of crime. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in NRS 179.183 with committing an act in this state, or in

a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of NRS 179.177 to 179.235, inclusive, not otherwise inconsistent shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

(Added to NRS by 1967, 1099)

179.191 Issuance of governor's warrant of arrest; its recitals. If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

(Added to NRS by 1967, 1099)

179.193 Manner and place of execution. Such warrant shall authorize the peace officer or other person to whom directed to:

1. Arrest the accused at any time and any place where he may be found within the state; and
2. Command the aid of all peace officers or other persons in the execution of the warrant; and
3. Deliver the accused, subject to the provisions of NRS 179.177 to 179.235, inclusive, to the duly authorized agent of the demanding state.

(Added to NRS by 1967, 1099)

179.195 Authority of arresting officer. Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

(Added to NRS by 1967, 1100)

179.197 Rights of accused person; application for writ of habeas corpus.

1. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him has appointed to receive him unless he is first taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel.

2. If the prisoner or his counsel state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

3. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the agent of the demanding state.

(Added to NRS by 1967, 1100)

179.199 Penalty for noncompliance with NRS 179.197. Any officer who delivers to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to NRS 179.197, shall be guilty of a misdemeanor.

(Added to NRS by 1967, 1100)

179.201 Confinement in jail when necessary.

1. The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

2. The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping. Such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

(Added to NRS by 1967, 1100)

179.203 Arrest prior to requisition.

1. Whenever any person within this state is charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under NRS 179.189, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole; or

2. Whenever complaint has been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under NRS 179.189, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole and is believed to be in this state,

the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit. A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

(Added to NRS by 1967, 1100)

179.205 Arrest without a warrant. The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding 1 year; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in NRS 179.203. Thereafter his answer shall be heard as if he had been arrested on a warrant.

(Added to NRS by 1967, 1101)

179.207 Commitment to await requisition; bail. If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under NRS 179.189, that he has fled from

justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time, not exceeding 30 days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused gives bail as provided in NRS 179.209, or until he is legally discharged.

(Added to NRS by 1967, 1101; A 1967, 1389)

179.209 Bail: In what cases; conditions of bond. Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, or unless the prisoner is charged as a parole violator or escaped convict, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state. No prisoner may be admitted to bail after having been arrested upon the warrant of the governor of this state.

(Added to NRS by 1967, 1101; A 1973, 800)

179.211 Extension of time of commitment; adjournment. If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in NRS 179.209, but within a period not to exceed 60 days after the date of such new bond.

(Added to NRS by 1967, 1101)

179.213 Forfeiture of bail. If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he is within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

(Added to NRS by 1967, 1102)

179.215 Persons under criminal prosecution in this state at time of requisition. If a criminal prosecution has been instituted against

such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

(Added to NRS by 1967, 1102)

179.217 Guilt or innocence of accused: When inquired into. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

(Added to NRS by 1967, 1102)

179.219 Governor may recall warrant or issue alias. The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

(Added to NRS by 1967, 1102)

179.221 Fugitives from this state; duty of governors. Whenever the governor of this state demands a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

(Added to NRS by 1967, 1102)

179.223 Application for issuance of requisition: By whom made; contents.

1. When the return to this state of a person charged with crime in this state is required, the district attorney shall present to the governor his written application for a requisition for the return of the person charged in which application shall be stated:

(a) The name of the person so charged;

(b) The crime charged against him;

(c) The approximate time, place and circumstances of its commission;

(d) The state in which he is believed to be, including the location of the accused therein at the time the application is made; and

(e) A certification that, in the opinion of the district attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

2. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the district attorney of the county in which the offense was committed, the state board of parole commissioners, or the warden of the institution or sheriff of the county from which escape was made shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated:

(a) The name of the person;

(b) The crime of which he was convicted;

(c) The circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole; and

(d) The state in which he is believed to be, including the location of the person therein at the time application is made.

3. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The district attorney, state board of parole commissioners, warden or sheriff may also attach such further affidavits and other documents in duplicate as he deems proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state of the State of Nevada to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

(Added to NRS by 1967, 1102; A 1969, 15)

179.225 Costs and expenses. When the punishment of the crime is the confinement of the criminal in the Nevada state prison, the expenses shall be paid from funds appropriated to the governor for such purpose, upon approval by the state board of examiners, but after such appropriation is exhausted the expenses shall be paid from the reserve for statutory contingency fund upon approval by the state

board of examiners; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and necessary traveling expenses and subsistence allowances in the amounts authorized by NRS 281.160 incurred in returning such prisoner.

(Added to NRS by 1967, 1103; A 1968, 22; 1969, 640; 1973, 170)

179.227 Immunity from service of process in certain civil actions. A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

(Added to NRS by 1967, 1103)

179.229 Written waiver of extradition proceedings.

1. Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in NRS 179.191 and 179.193 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; but before such waiver is executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in NRS 179.197.

2. If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent. Nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

(Added to NRS by 1967, 1103)

179.231 Nonwaiver by this state. Nothing contained in NRS 179.177 to 179.235, inclusive, shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under NRS 179.177 to 179.235, inclusive, which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

(Added to NRS by 1967, 1104)

179.233 No right of asylum; no immunity from other criminal prosecutions while in this state. After a person has been brought back to this state by or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

(Added to NRS by 1967, 1104)

179.235 Interpretation. The provisions of NRS 179.177 to 179.235, inclusive, shall be so interpreted and construed as to effectuate their general purposes to make uniform the law of those states which enact them.

(Added to NRS by 1967, 1104)

APPENDIX "B"

Argument of Counsel

BY THE COURT: Before arguing, in your opening remarks, Mr. Myers, you said that there was no statement by executive authority.

Will counsel approach the Bench.

> (Thereupon, counsel approached the Bench, and a discussion was had between Court and counsel, not reported.)

BY MR. MYERS: May it please the Court, first I would like to comment on the unusual procedural posture of this case.

Governor O'Callaghan had an application for a hearing. He has declined to act on that until after disposition is made of this Writ.

Because I have no idea whether he will grant that or not, I must assume that this is the last chance that Mr. Randono will have to be heard in the State of Nevada on this extradition matter. His fate rests in Your Honor's hands.

Mr. Randono has been the victim of a most peculiar set of circumstances, circumstances which he did not create himself. He has been placed in a real dilemma. The Affidavit that I have attached to the papers filed this morning indicate that Mr. Randono is a Nevada citizen.

BY THE COURT: I appreciate all of that, and I sympathize. Now, what about the rest? Going from the fact that he is a good Nevada citizen; he was in California and he was the subject of a criminal prosecution. Now, I'm not going to speculate whether he was guilty or not. I agree that that is not a proper subject. I understand that he was tried once and it was a hung jury, and he was tried again and there was a verdict. All we know is that he has a right to appeal, which if he would like to assert in California.

Now, if I grant a Writ, how would we ever do that?

BY MR. MYERS: Your Honor, that again is something that has been created not by Mr. Randono and not by myself, but by the District Attorney of Orange County. I think there is testimony and I will represent that we have made overtures and we would be willing to make concessions. In fact, we would have Mr. Randono go there voluntarily if we could get the assurance that he will get bail pending an appeal.

We do not have the assurance, and in fact, his counsel's testimony or opinion, is that if he returns, he will not get bail pending appeal.

If he would get this, it would be just fine, but this was created not by Mr. Randono, but by Orange County.

Now, returning to the crucial date of May 17, 1973. Mr. Randono at that time had a heart attack and he was in Southern Nevada Memorial Hospital. We sent down medical documentation to that effect, and he would have appeared if he had not had a heart attack. He would, according to the testimony, have been given bail pending an appeal. He would be back in Nevada, as his case would be on appeal, and it would ultimately be decided. But through no fault of his, he had a heart attack, and if Judge Spears would have entertained counsel's motion for a continuance for a short time until Mr. Randono had time to recuperate, he could have received bail pending an appeal. And again, everything would have been fine.

Unfortunately, he had this heart attack, and is now taking care of himself, so says the doctor. He may not have taken care of himself at one time, but he is taking care of himself now and it is not his fault that he had a heart attack. Again, it was no fault of his own. He was not there because he had a physician, a Nevada physician's report, and Judge Spears declined to grant a short continuance. If he had, none of this would have happened.

Now, why was it denied? Because, unfortunately, Mr. Randono comes from that notorious city of Las Vegas, Nevada. If he came from a place like Phoenix or another city, in all probability the statement of the doctor would have been honored. And again, everything would have been proceeding according to California law. But, Judge Spears denied it because he was a Nevada citizen.

The fact that he is a Nevada citizen is no fault of Mr. Randono. Again, everything has been created by things that have happened and occurred in Orange County; not because of Mr. Randono.

We have tried to resolve this matter on an amicable basis and we have not been successful.

If Mr. Randono were to return now to California, he will not get bail pending an appeal. He will be incarcerated for a period of anywhere from six to eighteen months. He has a heart condition, which, under the physician's testimony, can very well be fatal. Not so much because the California medical facilities are not available, but because of the situation created by simple confinement.

Our contention, Your Honor, is set forth in the various briefs, and I would submit, Your Honor, that to require Mr. Randono to now go back to California under these circumstances would be to deny all of the constitutional rights that he has.

Now, Your Honor, I think that I am not being over-dramatic, but

under the physician's testimony, may I say that should a Writ be denied, that this is tantamount to Mr. Randono's death.

BY THE COURT: Well, I understand the emotional impact of all of this, as I told you before.

BY MR. MYERS: Well, this is more than an emotional impact. I think it is more than a traumatic impact. I think it is very real and practical, and it may very well cause his death just because of an anti-Nevada attitude, and I would urge Your Honor to let this man die in Nevada, rather than in the Orange County jail waiting for the Supreme Court to act.

BY THE COURT: Well, I don't want to hear any more about that. I want to hear about the law.

BY MR. MYERS: Well, Your Honor, the law in this state permits this testimony under these special circumstances, and the law, as the Constitution provides, is that this man should not be prejudiced because he comes from a particular state, and if he will be prejudiced because he does come from this particular state, that prejudice will ultimately result in his death. Just because he is a Nevada citizen, if this Writ is denied. And for those reasons, we ask that the Writ be granted.

BY MR. SIMON: Your Honor, I think clearly and strictly the legal issue is the paper that supports the Nevada Governor's Warrant. Are they in proper order? Was there a proper demand from the Governor of California?

There are numerous other documents that establish probable cause, but I think the only issues that defense counsel seriously posed to this Court are that there would be a serious jeopardy to Defendant's life if he were returned and there exists prejudice against a Nevada citizen in the Orange County Court to which he would be returned.

Now, as to the state of his health, I think that clearly Dr. Friedman has established that he does have a very serious heart condition. It is the State's position that this is the type of matter that should not be considered by the Court, but should be considered by the Governor of Nevada at a Nevada Governor's hearing and I don't believe that this type of matter is properly before the Court on a Writ of Habeas Corpus.

As to the issue of prejudice in Orange County, the only evidence we have of that is the statement made to the Court which was not even under oath, that he talked to some Deputy District Attorney in Orange County, who he has not identified, who relayed an off-the-cuff comment that the Judge made off the record.

Now, I would submit, Your Honor, that there is no basis for the

Writ and the State would ask that the Writ be denied, and that we would stipulate, Your Honor, that if Your Honor does determine to deny the Writ, I think certainly Mr. Randono should have adequate time to have a Governor's hearing, so he can raise the issues of his health, which, of course, is a serious matter.

Dr. Friedman testified that he would testify before the Governor, if such a hearing were held, and Dr. Friedman also testified that he would be willing to testify before the California Court.

BY MR. MYERS: Your Honor, counsel states that the only evidence of Orange County anti-Nevada prejudice was through Mr. Pomeranz. Mr. McBride, an eminent California counsel and former Judge in Orange County testified here under oath, and I think really that was a very courageous thing to do to come into this jurisdiction and testify that a Judge on the Bench in Orange County, California has regional prejudice and it has resulted in the denial of this man's rights. So this is additional evidence.

In addition to those constitutional guarantees, the three that I have already relied upon, we rely upon the rule regarding cruel and unusual punishment, and it would be cruel and unusual punishment to send this man back to California under the circumstance of this case, and the circumstances which he did not create. It would certainly be nothing less than cruel and unusual.